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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 563.

UNITED STATES OF AMERICA,
Petitioner,

vs.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC., ETC.,
Respondent.

PETITION FOR REHEARING.

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS,
Counsel for Respondent.

Of Counsel:
BARTON, WILMER, BRAMBLE, ADDISON & SEMANS.

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PETITION FOR REHEARING.

L. Manuel Hendler, Transferee, Etc., the Respondent in this case, respectfully petitions this Court for a rehearing of said cause.

The judgment of this Court, reversing the judgments below, was entered March 28, 1938, and this petition, in compliance with Rule 33, is filed within twenty-five (25) days thereafter.

GROUNDS SUBMITTED FOR REHEARING.

1. A rehearing of this case is in the interest of the Government as much as in that of the business community. The far-reaching consequences of the decision

are emphasized by the many communications received by Respondent urging that the Court be asked to grant a rehearing of the case.

2. The Court treated this case as involving only and controlled by the question decided in the recent case of Minnesota Tea Company vs. Helvering, 302 U. S. —. It is respectfully submitted that not only were the facts in the two cases very different but the reasons further assigned in the opinion in the instant case were not the reasons assigned for the decision in the Minnesota Tea case.

In that case the only question presented and decided was whether moneys admittedly actually received by the transferor, and which admittedly would be taxable gain unless distributed to stockholders, could escape such tax by being nominally "distributed" to stockholders on agreement that it be by them immediately redistributed to creditors.

3. In the instant case the moneys were undeniably never received by the transferor, but were paid direct to the creditors by Borden, the substituted debtor. Of course, in estimating the difference between original cost and transfer valuation of the assets, assumption of the transferor's debts in this as in all such cases represents a "benefit" to the transferor such as is spoken of in the opinion, resulting to the transferor from such assumption, although that benefit is not received from the transferee, who gives in exchange its stock only to the extent of the value of the equity received. The question is not whether there is in all such transactions the "benefit" above referred to but whether under the various provisions of the Revenue Act relative to reorganizations of

different kinds the value of such benefit inevitably represents taxable income to the transferor.

Not only the Respondent's brief but the opinions of both Courts below set out many reasons and cite many authorities in support of the view that such was not intended and that otherwise the very purpose of these provisions would be thwarted. Moreover, even the Government does not deny that the uniform practice heretofore in all such cases has been contrary to the view that such does involve taxable income.

4. The opinion in effect lays down the rule that if there is a benefit (which Respondent, of course, does not deny) then such is necessarily taxable income because not in express terms exempted in the statute. On this principle every type of reorganization contemplated in the statute would inevitably involve taxable income.

Without repeating the many illustrations given in the brief and in the opinions of the Courts below Respondent respectfully suggests the following:

(a) *A mere change of Charter.*

A corporation of State A transfers all its assets, obligations and business bodily to a corporation of State B, the mere purpose being to change the State of incorporation. Inevitably to the extent of gain on all obligations thus transferred the corporation becomes liable for income tax.

(b) *Incorporation of business.*

An individual or a partnership incorporates its business, transfers the business as an entirety, and issues stock representing the equity. Inevitably such individual or partnership becomes liable for income

tax on gain resulting from the debts and obligations so assumed.

(c) *Reorganization under Section 77B.*

A struggling corporation, being reorganized under Section 77B of the Bankruptcy Act, transfers its entire assets, debts and business to a new corporation. Inevitably the already embarrassed corporation becomes liable also for income tax to the extent of gain on the obligations so transferred.

In none of these cases, any more than in the instant case, do the provisions of the Revenue Act covering such transactions in express terms provide that no such "gain" shall be taxable. Hence the principles announced in the opinion in the instant case involve the results above set forth.

It is again very earnestly submitted that the very purpose of these sections was to make possible these transactions without involving tax, and the various amendments from time to time made were designed to accomplish the same result, although the method adopted differed from that first covered in the statute, of a mere exchange of stock for stock.

Respectfully submitted,

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS,
Counsel for Respondent.

Of Counsel:

BARTON, WILMER, BRAMBLE, ADDISON & SEMANS.

CERTIFICATE.

I, RANDOLPH BARTON, JR., one of the attorneys for respondent in the within entitled action, hereby certify that the foregoing Petition is, in my judgment, well founded and is not interposed for delay.

RANDOLPH BARTON, JR.,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 563.—October Term, 1937.

United States of America, Petitioner, *vs.* L. Manuel Hendler, as Transferee of Creameries, Inc. (Formerly Hendler Creamery Co., Inc.). } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 28, 1938.]

Mr. Justice Black delivered the opinion of the Court.

The Revenue Act of 1928[1] imposed a tax upon the annnal "net income" of corporations. It defined "net income" as "gross income . . . less the deductions allowed . . .", and "gross income" as including "gains, profits and income derived from . . . trades . . . or sales, or dealings in property, . . . or gains or profits and income . . . from any source whatever."[2]

Section 112 of the Act[3] exempts certain gains which are realized from a "reorganization" similar to, or in the nature of, a corporate merger or consolidation. Under this Section, such gains are not taxed if one corporation, pursuant to a "plan of reorganization" exchanges its property "solely for *stock* or *securities*, in another corporation, a party to the reorganization." But, when a corporation not only receives "stock or securities" in exchange for its property, but also receives "other property or money" in carrying out a "plan of reorganization,"

"(1) If the corporation receiving such other property or money *distributes* it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money *does not distribute* it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized [taxed]; . . . ."

[1] Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 13.
[2] *Id.*, Sec. 21-22.
[3] *Id.*, Sec. 112.

In this case, there was a merger or "reorganization" of the Borden Company and the Hendler Creamery Company, Inc., resulting in gains of more than six million dollars to the Hendler Company, Inc., a corporation of which respondent is transferee. The Court of Appeals, believing there was an exemption under Section 112, affirmed[4] the judgment of the District Court[5] holding all Hendler gains non-taxable.

This controversy between the government and respondent involves the assumption and payment—pursuant to the plan of reorganization—by the Borden Company of $534,297.40 bonded indebtedness of the Hendler Creamery Co., Inc. We are unable to agree with the conclusion reached by the courts below that the gain to the Hendler Company, realized by the Borden Company's payment, was exempt from taxation under Section 112.

It was contended below and it is urged here that since the Hendler Company did not actually receive the money with which the Borden Company discharged the former's indebtedness, the Hendler Company's gain of $534,297.40 is not taxable. The transaction, however, under which the Borden Company assumed and paid the debt and obligation of the Hendler Company is to be regarded in substance as though the $534,297.40 had been paid directly to the Hendler Company. The Hendler Company was the beneficiary of the discharge of its indebtedness. Its gain was as real and substantial as if the money had been paid it and then paid over by it to its creditors. The discharge of liability by the payment of the Hendler Company's indebtedness constituted income to the Hendler Company and is to be treated as such.[6]

Section 112 provides no exemption for gains—resulting from corporate "reorganization"—neither received as "stocks or securities", nor received as "money or other property" and distributed to stockholders under the plan of reorganization. In *Minnesota Tea Co.* v. *Helvering*, 302 U. S. —, it was said that this exemption "contemplates a distribution to stockholders, and not payment to creditors." The very statute upon which the taxpayer relies provides that "If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorgani-

[4] 91 F. (2d) 680; cert. granted, — U. S. —.

[5] 17 Fed. Supp. 558.

[6] Old Colony Trust Co. v. Comm. of Int. Revenue, 279 U. S. 716, 729. Douglas v. Willcuts, 296 U. S. 1, 8, 9.

zation, the gain, if any, to the corporation shall be recognized [taxed] . . . ."

Since this gain or income of $534,297.40 of the Hendler Company was neither received as "stock or securities" nor distributed to its stockholders "in pursuance of the plan of reorganization" it was not exempt and is taxable gain as defined in the 1928 Act. This $534,297.40 gain to the taxpayer does not fall within the exemptions of Section 112, and the judgment of the court below is

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.